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4 UNITED STATES DISTRICT COURT  
5 DISTRICT OF NEVADA  
6 RENO, NEVADA

7 RICHARD CHUDACOFF, M.D., ) 2:08-cv-00863-ECR-RJJ  
8 )  
9 Plaintiff, )  
10 vs. ) Order  
11 UNIVERSITY MEDICAL CENTER; et al., )  
12 Defendants. )  
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14 Now pending are a number of motions filed after the case was  
15 remanded to this Court upon appeal. The motions are ripe, and we  
16 now rule on them.

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18 I. Background

19 Plaintiff Richard Chudacoff, M.D. ("Plaintiff" or "Chudacoff")  
20 is a physician who was appointed to the position of Assistant  
21 Professor with the University of Nevada School of Medicine, and  
22 granted staff privileges at the University Medical Center of  
23 Southern Nevada ("UMC") in the obstetrics and gynecology department.  
24 Chudacoff worked at UMC from December 20, 2007, through May 28,  
25 2008.

26 In 2008, the Medical Executive Committee ("MEC") suspended  
27 Chudacoff's obstetrical privileges. Chudacoff requested a fair  
28 hearing, but before the hearing was held, Chudacoff was terminated

1 from the University of Nevada School of Medicine. Defendants filed  
2 a report with the National Practitioner Data Bank ("NPDB") stating  
3 that Chudacoff's privileges had been suspended indefinitely for  
4 substandard care and skill level.

5 On July 2, 2008, Chudacoff filed the original complaint in this  
6 case. A fair hearing was held, and the hearing committee ultimately  
7 disagreed with some of the MEC's determinations. Additional  
8 hearings were also held with respect to Chudacoff's quality of care  
9 and alleged misrepresentations on his application.

10 While the administrative process was ongoing, this Court  
11 granted partial summary judgment in favor of Chudacoff (#109),  
12 holding that Chudacoff was denied constitutionally sufficient  
13 procedural protections before being deprived of a protected property  
14 interest. Ultimately, however, we granted summary judgment in favor  
15 of Defendants (#229), finding, *inter alia*, that the individual  
16 doctor Defendants were not acting under color of state law and thus  
17 could not be liable under § 1983. We dismissed the state law claim  
18 against UMC and the Board of Trustess of UMC ("the Commissioners")  
19 because we did not elect to exercise supplemental jurisdiction after  
20 dismissal of the federal claim. The case was appealed to the Court  
21 of Appeals for the Ninth Circuit, and the Ninth Circuit reversed our  
22 determination that the individual doctor Defendants John Ellerton  
23 ("Ellerton"), Dale Carrison ("Carrison"), Marvin Bernstein  
24 ("Bernstein"), and Donald Roberts ("Roberts"), members of the MEC,  
25 are not state actors.

26 On August 28, 2009, before we granted summary judgment (#229)  
27 in favor of Defendants, Chudacoff filed a second action ("Chudacoff  
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1 II") in this district against doctors who participated in the second  
2 and third administrative hearings held subsequent to the filing of  
3 the present action. (2:09-cv-01679-RCJ-RJJ.)

4 Several motions have been filed since the case has been  
5 remanded, and are addressed in this Order.

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7 **II. Plaintiff's Motion to File Third Amended Complaint (#359)**

8 Chudacoff seeks to file a third amended complaint to properly  
9 plead claims under 42 U.S.C. § 1983, remove claims that have been  
10 decided in favor of Defendants, and add defendants.<sup>1</sup>

11 The Court of Appeals for the Ninth Circuit reversed our  
12 determination (#229) that defendants Ellerton, Carrison, Bernstein,  
13 and Roberts were not acting under color of state law, and ordered  
14 that Chudacoff be permitted to amend his complaint to bring a § 1983  
15 claim against Ellerton, Carrison, Bernstein, and Roberts. Plaintiff  
16 seeks to go beyond what the Ninth Circuit has ordered by including  
17 additional Defendants in his proposed amended complaint.

18 It is the doctor defendants in Chudacoff II that Chudacoff  
19 wishes to add to the present case. In Chudacoff II, Judge Robert C.  
20 Jones granted defendants' motion to dismiss, renewed motion to  
21 dismiss, and motion for summary judgment. Judge Jones held that  
22 Chudacoff's due process claims against defendants who are defendants

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24 <sup>1</sup> Chudacoff argues that Defendants' opposition is untimely.  
25 Chudacoff filed the Motion to for Leave to File Third Amended  
26 Complaint (#259) on June 27, 2011, before the mandate of the Ninth  
27 Circuit was issued on July 1, 2011. Defendants' response, filed on  
28 July 14, 2011, is not untimely. This Court granted Defendants  
additional time due to Chudacoff's premature filing of the motion  
(#259).

1 in our case are barred by claim preclusion. Judge Jones did not  
2 find claim preclusion against the new defendants. Instead, he held  
3 that issue preclusion barred Chudacoff's claims against the doctor  
4 defendants in Chudacoff II based on our determination (#229) that  
5 the individual doctors in this case were not acting under color of  
6 state law. Chudacoff II is currently on appeal.

7 Chudacoff seeks to add the claims that are on appeal in  
8 Chudacoff II to our case. While Chudacoff must be permitted to  
9 properly plead his § 1983 claim against Ellerton, Carrison,  
10 Bernstein, and Roberts, we deny Chudacoff's request to file claims  
11 against additional doctor defendants while identical claims are on  
12 appeal in Chudacoff II. Therefore, Chudacoff's Motion for Leave to  
13 File Third Amended Complaint (#259) shall be granted in part and  
14 denied in part on the basis that Chudacoff may plead a § 1983 claim  
15 against Ellerton, Carrison, Bernstein, and Roberts, but may not  
16 bring claims against the defendants in Chudacoff II at this time.

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18 **III. Plaintiff's Motion to Strike (#274) Docs. ## 271, 272**

19 Chudacoff requests that we strike documents # 271, 272 on the  
20 docket. Counsel for defendants in Chudacoff II filed oppositions  
21 (## 271, 272) to Chudacoff's Motion to Re-Open Discovery (#258) and  
22 Motion for Leave to File Third Amended Complaint (#259). These  
23 filings were inappropriate because counsel for the defendants in  
24 Chudacoff II does not represent any of the defendants remaining in  
25 this case, and the filings (## 271, 272) shall be stricken.

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1                   **IV. Plaintiff's Motion for Consolidation (#276)**

2           Chudacoff requests that we consolidate the present case with  
3 Chudacoff II. Federal Rule of Civil Procedure 42(a) provides that  
4 "[i]f actions before the court involve a common question of law or  
5 fact, the court may . . . consolidate the actions." Chudacoff II is  
6 currently on appeal and is not pending before this Court, and  
7 therefore, we lack the authority to consolidate this case with  
8 Chudacoff II.

9           In his reply (#297), Chudacoff argues that the Motion for  
10 Consolidation (#276) actually requests an indicative ruling on the  
11 issue of consolidation. We decline to make an indicative ruling  
12 while Chudacoff II is on appeal.

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14                   **V. Plaintiff' Motion For Reconsideration of (#277) Dismissal of**  
15                                   **Kathleen Silver**

16           Chudacoff requests that we reconsider the dismissal of Kathleen  
17 Silver. The Ninth Circuit affirmed summary judgment in her favor,  
18 stating that Silver sits on the MEC, but does so in a non-voting,  
19 non-deliberating capacity. Chudacoff's "new evidence" consists of a  
20 an email and affidavit stating that Silver "emphasized that it was  
21 all personal with Dr. Roberts retaliating against [Chudacoff]."  
22 (Pl.'s Mot. for Reconsideration of Dismissal of Kathleen Silver at 3  
23 (#277).) This evidence is entirely insufficient for the Court to  
24 reconsider the dismissal of Silver. Even if true, the evidence does  
25 not show that Silver was an "integral participant" in the  
26 deprivation of Chudacoff's rights, as is required for § 1983  
27 liability. See Chudacoff v. Univ. Med. Ctr. of S. Nev., 649 F.3d  
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1 1143, 1151 (9th Cir. 2011). Plaintiff's Motion (#277) shall be  
2 denied.

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4 **VI. Plaintiff's Motion for Attorney's Fees (Interim) (#278)**

5 Plaintiff's request for interim attorney's fees (#278) is  
6 premature and shall be denied.

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8 **VII. Plaintiff's Motion for Reconsideration (#279)**

9 Chudacoff requests reconsideration of this Court's Order (#229)  
10 dismissing Chudacoff's claim against UMC and the Commissioners for  
11 breach of the implied covenant of good faith and fair dealing. The  
12 state claim was dismissed because we did not elect to exercise  
13 supplemental jurisdiction after granting summary judgment on  
14 Chudacoff's § 1983 claim. Chudacoff argues that because the § 1983  
15 claim against the doctor Defendants has been remanded to this Court,  
16 supplemental jurisdiction exists and this Court should allow  
17 Chudacoff to pursue his claim for breach of the implied covenant of  
18 good faith and fair dealing against UMC and the Commissioners.

19 We reject Defendants' argument that Chudacoff waived his right  
20 to bring this motion because he failed to appeal our dismissal of  
21 the state law claim. That claim was dismissed because we did not  
22 elect to exercise supplemental jurisdiction upon dismissal of the  
23 federal claim. The federal claim has been remanded to this Court,  
24 and Chudacoff is not barred from arguing that we should allow him to  
25 pursue his state claim. Federal Rule of Civil Procedure 60(b)(5)  
26 provides that "the court may relieve a party . . . from a final  
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1 judgment, order, or proceeding [if] . . . it is based on an earlier  
2 judgment that has been reversed or vacated.”

3 28 U.S.C. § 1367 provides that “in any civil action of which  
4 the district courts have original jurisdiction, the district courts  
5 shall have supplemental jurisdiction over all other claims that are  
6 so related to claims in the action within such original jurisdiction  
7 that they form part of the same case or controversy.” While the  
8 defendants against whom this state law claim has been brought are  
9 third parties to the federal claim against the doctor Defendants, it  
10 appears that in the interests of judicial economy, this Court should  
11 allow Chudacoff to bring the state law claim against UMC and the  
12 Commissioners. The claim is related to Chudacoff’s § 1983 claim  
13 against the individual doctor Defendants, and had been brought in  
14 this case prior to our dismissal of the § 1983 claim. Chudacoff’s  
15 Motion (#279) shall be granted.

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17 **VIII. Plaintiff’s Motion to Re-Open Discovery (#258)**

18 Chudacoff requests that we re-open discovery to allow Chudacoff  
19 to amend his initial disclosures to include evidence related to  
20 damages suffered since May 2009. Chudacoff also wishes to present  
21 evidence of extended harm to his career during the pendency of the  
22 appeal. Chudacoff also seeks information Defendants withheld under  
23 the “peer review privilege.” Chudacoff cites a case from this Court  
24 refusing to recognize academic peer review privilege. Williams v.  
25 UMC, 760 F. Supp. 2d 1026 (D. Nev. 2010).

26 Defendants oppose on the basis that Chudacoff’s requested  
27 discovery is overly broad. We agree that Chudacoff should not be

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1 allowed to seek discovery related to the proposed defendants from  
2 Chudacoff II. However, we will re-open discovery for a limited  
3 period to allow Chudacoff to present evidence of his damages since  
4 discovery was closed previously, and to seek any materials withheld  
5 under the guise of peer review privilege.

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7 **IX. Conclusion**

8 **IT IS HEREBY ORDERED** that Plaintiff's Motion for Leave to File  
9 Third Amended Complaint (#259) is **GRANTED IN PART AND DENIED IN**  
10 **PART**. Plaintiff shall have twenty-eight (28) days within which to  
11 file a third amended complaint pleading a § 1983 claim against  
12 defendants Ellerton, Carrison, Bernstein, and Roberts. Plaintiff's  
13 Motion for Reconsideration of the Dismissal of the State Law Claims  
14 (#279) is **GRANTED**. The amended complaint may include a claim for  
15 breach of the implied covenant of good faith and fair dealing  
16 against UMC and the Commissioners.

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18 **IT IS FURTHER ORDERED** that Plaintiff's Motion to Re-Open  
19 Discovery (#258) is **GRANTED**. Discovery shall be re-opened on the  
20 issue of Plaintiff's damages and any information withheld on the  
21 basis of peer review privilege for a period of ninety (90) days  
22 following the filing of Plaintiff's amended complaint. Dispositive  
23 motions shall be due within thirty (30) days after the close of  
24 discovery. A pre-trial order shall be due within thirty (30) days  
25 after the date dispositive motions were due, if none are filed, or  
26 within thirty (30) days after the date any dispositive motions are  
27 ruled upon.



